The Circuit Court
For The Third Judicial Circuit of Michigan
Detroit, Michigan 48226

William J. Giovan
Judge

(313) 224-5430

September 11, 2006

Corbin R. Davis
Clerk of the Supreme Court

Re: Comments by Civil Division Judges Re: ADM File No. 2005-19

Dear Mr. Davis:

On August 9, 2006 several judges of the Civil Division of the Wayne County Circuit Court met to discuss the court rule amendments proposed in the above order. In addition to the undersigned, the following judges participated:

Hon. Wendy M. Baxter
Hon. Robert J. Colombo, Jr.
Hon. John H. Gillis, Jr.
Hon. Kathleen Macdonald
Hon. Michael F. Sapala

The following summarizes the judges' views on those portions of the rules that propose a significant change from present practice.

Rule 2.513 (A)

This section requires that jurors be instructed in preliminary instructions on the elements on all civil claims and charged offenses and requires as well that each juror be given a copy of such instructions.

The judges unanimously oppose this requirement. Often in civil cases a number of different causes of action are pleaded, and it is often uncertain as to those that will survive.

The court could be instructing on causes upon which there will be no deliberation, possibly with prejudice to one party or another.

In addition, this requirement is likely to generate conferences about jury instructions that would otherwise be unnecessary. The utility of instructing jurors on the elements before a hearing varies from case to case. Judges already can instruct on the elements of a cause of action under the present rules when it seems appropriate to do so, and counsel have the option of highlighting the elements in opening statements if they deem it necessary or helpful to do so. We believe it to be unnecessary, and sometimes harmful, to impose this requirement on one hundred percent of the cases, particularly considering that the rules presently permit such instruction where it is appropriate. For many of the same reasons, neither should written preliminary instructions be required in all cases.

Rule 2.513 (D)

This provision would give the court discretion to the parties to present "interim commentary" at various junctures of the trial. The language seems vague, and we find it difficult to forsee instances when this device would be useful in comparison to the time consumed. If it is adopted, it should be entirely discretionary, as it is in the proposal.

Rule 2.513 (E)

The rule directs the court to encourage counsel to provide jurors with a notebook containing a variety of specified documents. The judges are opposed. to being required to encourage counsel to fashion a notebook in every case. Even attorneys who comply with a court's request are liable to have disputes about what the notebook should contain. There is nothing to prevent the court and the parties to arrange for notebooks for jurors in those limited cases where it may be useful, and it seems superfluous to require the court to encourage the same in each case. The encouragement is likely to be insincere.

Rule 2.513 (F)

The rule requires the court to encourage the parties to prepare written summaries of depositions in place of reading them, and to provide copies of the summaries to the jury. We are opposed to any such procedure. Drafting a summary of a deposition is a highly subjective endeavor to start with, and it is likely to consume much time in resolving the disputes. Furthermore, evidence consists of the testimony of witnesses under oath. That is to say, their words, not someone's summary of what they intended to say. It seems highly irregular, morever, that the jury should hear the specific testimony of some witnesses and not others, governed solely by the happenstance of which witnesses testify by deposition.

Rule 2.513 (G)

This rule relates to the scheduling of expert testimony. Subsections (1) And (2) are already within the discretion of the court. (Actually, the group felt that Subsection (2), allowing opposing experts to be present during the opponent's testimony in order to aid counsel, could not properly be denied.)

The judges are strongly opposed to the alternative in Subsection (3), i.e., providing for a panel discussion of experts. This is an essentially uncontrollable process, in addition to being expensive, unnecessarily time-consuming, and cumbersome. The rules of evidence, moreover, would be meaningless.

Rule 2.513 (H)

Most of this section on note taking by jurors coincides with existing discretion. There was a division of opinion, however, on whether the court should be required to collect and destroy all juror notes. All felt that the requirement should be discretionary with the court.

Rule 2.513 (J)

This section is essentially the same as present MCR 2.513 (A), but adds that the court may respond to an initiative from the jury, as well as the parties, for taking a view. This presents no change from present practice because the court would be required to respond to a jury request in any event. But we believe that both the proposed rule and the existing one in civil cases have a shortcoming because they limit comments at the view to "an officer designated by the court." During a view it is usually helpful for the court or counsel to identify places or matters discussed during court testimony. That is permitted by the existing rule in criminal cases, MCR 6.414(F), and we recommend that the latter rule should apply in both civil and criminal cases.

Rule 2.513 (K)

This rule allows for juror discussion of the case during recesses. The group had mixed reaction to this departure from present practice. At least two objections were raised. The preliminary discussions might include persons later excused from the jury, and, perhaps more significant are the considerations behind the existing prohibition: opinions of the case may become fixed before the evidence is completed, and jurors who express a firm conviction at an early stage may be reluctant to accept or announce a different position in spite of subsequent evidence. Granting that there could be rare instances where interim discussion is beneficial, the majority have no objection so long as the procedure is discretionary with the court, as it is in the proposed language.

Rule 2.513 (M)

This rule allows the judge to comment on the evidence. We are unanimously opposed to this procedure. First, it seems inconsistent to say that the court may comment on the weight of the evidence, and at the same time say that the comment must be fair and impartial and not disclose a view of credibility or any ultimate fact. How can an opinion about the weight of the evidence not disclose a viewpoint about one or the other? Second, a discussion of the evidence by the court seems fertile ground for claims of error. What is "fair and impartial" comment is a subjective matter, depending upon who is making the assessment. And, finally, if the comment is truly impartial and complete, we may inquire what is added by this additional risk-laden and time-consuming element.

We note, remarkably enough, that the ability of the court to comment on the evidence is stated in the present rules. MCR 2.516(B)(3). If this privilege was ever employed, it is universally ignored today. Some judges, indeed, might relish the opportunity to comment on the evidence, but we believe that any such comment that could be seen as anything but exquisitely impartial would invite reversal under present practice, and we recommend that some consideration be give to removing the provision from the existing rule

Rule 2.513 (N)(2)

This sub-rule requires that the judge invite questions about the instructions to be submitted in a sealed envelope after deliberations begin and that the judge solicit questions as well at the conclusion of final instructions. The majority of judges are opposed to mandating the solicitation of questions. At least one judge invites questions in every instruction and approves the requirement. None believe that a sealed envelope is necessary.

Rule 2.513 (N)(3)

This sub-rule would require that the court provide each juror with a copy of final instructions. Some judges do so now, and others do not. The consensus is that supplying written instructions should be discretionary, as in the present practice. There is a wide discrepancy among courts and individual trials regarding the complexity of instructions, the availability of secretarial help, and the pressures of time. In some instances the provision of a full set of instructions will be helpful; in others it will be completely superfluous. Presently there is discretion to provide a complete or partial set of written instructions. The practice has worked well, and it should not be replaced by an inflexible rule that cannot accommodate individual circumstances.

Rule 2.513 (N)(4)

This innovation would permit the court to inquire about the subject of an impasse in jury deliberations and to offer clarifying instructions to aid in resolving it. Some judges might welcome the prospect of assisting a jury through a conflict, but we are unanimously wary of what sensitive information that an inquiry may produce, together with the possibility of a claim of reversible error. Present practice forbids a revelation of so little as how the voting stands, in order to preclude pressure on dissenting jurors (a particular concern in criminal cases). The proposed procedure allows for a significantly larger inquiry, not to mention the difficulty in fashioning a response that will not provide the occasion for a claim of error. As in the case of judicial comment on the evidence, we believe that the adoption of this rule would require considerable tolerance of the results by the appellate courts.

Rule 2.514 (A)(1) and (3)

The proposed sub-rules codifies what is sometimes done today, particularly the common practice of allowing all jurors to deliberate when more than 6 are seated.. To be explicitly correct, however, we believe that additional language should be added to proposed sub-rules (1) and (3):

,AND IN SUCH EVENT THE PARTIES SHALL AGREE ON THE NUMBER OF VOTES NECESSARY TO CONSTITUTE A VERDICT.

Respectfully submitted,

William J. Giovan
Presiding Judge, Civil Division